# COMMON MARKET LAW REVIEW

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**Aims**
The Common Market Law Review is designed to function as a medium for the understanding and implementation of European Union Law within the Member States and elsewhere, and for the dissemination of legal thinking on European Union Law matters. It thus aims to meet the needs of both the academic and the practitioner. For practical reasons, English is used as the language of communication.



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**Establishment and Aims**

The Common Market Law Review was established in 1963 in cooperation with the British Institute of International and Comparative Law and the Europa Instituut of the University of Leyden.The Common Market Law Review is designed to function as a medium for the understanding and analysis of European Union Law, and for the dissemination of legal thinking on all matters of European Union Law. It aims to meet the needs of both the academic and the practitioner. For practical reasons, English is used as the language of communication.

**Editorial policy**

The editors will consider for publication manuscripts by contributors from any country. Articles will be subjected to a review procedure. The author should ensure that the significance of the contribution will be apparent also to readers outside the specific expertise. Special terms and abbreviations should be clearly defined in the text or notes. Accepted manuscripts will be edited, if necessary, to improve the general effectiveness of communication. If editing should be extensive, with a consequent danger of altering the meaning, the manuscript will be returned to the author for approval before type is set.

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Manuscripts should be submitted together with a covering letter to the Managing Editor. They must be accompanied by written assurance that the article has not been published, submitted or accepted elsewhere. The author will be notified of acceptance, rejection or need for revision within three to nine weeks. Digital submissions are welcomed. Articles should preferably be no longer than 28 pages (approx. 9,000 words). Annotations should be no longer than 10 pages (approx. 3,000 words). Details concerning submission and the review process can be found on the journal's website http://www.kluwerlawonline.com/toc.php?pubcode=COLA

Fabrice Picod and Sébastien van Drooghenbroeck (Eds.), *Charte des droits fondamentaux de l'Union européenne. Commentaire article par article*. Bruylant, 2018. 1280 pages. ISBN: 9782802760412. EUR 150.

*Le voilà enfin*! The new francophone commentary of the EU Charter of Fundamental Rights has been published. It follows the footsteps of the earlier French language commentary which was published in 2005 under the editorship of Laurence Burgorgue-Larsen, Anne Levade and Fabrice Picod (*Traité établissant une Constitution pour l'Europe Commentaire article par article*). In contrast with this earlier work, which was written almost exclusively by French academics, the present volume, which is almost double in size, consists of contributions by French and Belgian authors. Only two contributions have survived from the 2005 edition: Galloux's work on Article 13 of the Charter and Picod's commentary on Article 38.

As suggested by its title, the book offers a comprehensive introduction to the law on every provision of the EU Charter. Apart from the "Article by Article" commentaries, it contains the text of the Charter, the Explanatory Notes to the Charter, and a list of cases referred to in the different chapters. The latter list also contains cross-references to the relevant Charter provisions. The editors must have done an enormous work to keep the different contributions together and produce the consistency – in terms of both the approach and the content of the different chapters – which makes this new commentary an enlightening read as well as a useful contribution to the academic literature. (Picod's former co-editor Bugorgue-Larsen launched into another exciting Charter-related project: *La Charte des droits fondamentaux saisie par les juges en Europe – The Charter of Fundamental Rights as apprehended by Judges in Europe*, 2017). Its uses are much broader than academic research; students and practitioners of EU law will be able to use it as a core reference text in the law of human rights of the EU.

The main advantage of the book lies in the evident freshness of its content. It contains the latest developments in the case law of the ECJ, and each chapter has an up-to-date list of further reading, although predominantly in French. Some of the chapters also cover the recent political and legislative developments in Europe relevant to the Charter article. For example, Willems' contribution on Article 9 on the right to marry and the right to found a family discusses issues such as the marriage of transsexuals in Europe, marriages of convenience, polygamy, procreation and abortion. Gonzalez's piece on Article 10 on freedom of thought, conscience and religion puts emphasis on the current legal development affecting the open manifestation of religious conviction in the workplace. Bodart, when covering Article 18 on the right to asylum, raises the delicate question of the legal nature of the EU-Turkey Statement and offers a quick assessment of the inadequacy of the EU's common asylum system. Carlier's chapter on Article 45 on the freedom of movement and residence touches upon the issue of "social tourism" and the problem of cross-border social dumping in the EU. Necessarily, in a legal area as rapidly developing as EU human rights law, the freshness of a commentary will fade, and quite rapidly at that. Since the publication of the book, the ECJ has already delivered a number of key rulings which clarified fundamental issues relating to the applicability of certain Charter provisions, and in the next couple of months it will have the opportunity to interpret provisions of the Charter which so far have not been litigated extensively.

In the structure of the individual contributions, the "francophone" commentary of the Charter does not follow the example of its English or German language counterparts. The authors seem to have enjoyed considerable freedom in developing the structure of their contribution, and they have often done so by giving "speaking titles", which reflect the legal content discussed, to the different parts. The leading English language edition, the commentary by Peers et al. (*The EU Charter of Fundamental Rights: A commentary*, 2014), discusses the individual Charter provisions in a strict structure of "field of application", "interrelationship with other provisions", "sources", "scope of application", "limitations and derogations", and "evaluation". The contributions in the *Kommentar* edited by Meyer (*Charta der Grundrechte der Europäischen Union*, 2014) contain a part on the legislative history of the particular Charter article pre-Lisbon Treaty. The Bruylant commentary, nonetheless, contains, like the English and German commentaries, a list of further reading for each Charter article. This should provide

an outstanding gateway to the "French EU legal scholarship", which continues to exist in parallel with the perhaps more dominant English or German language scholarship.

As an important added value of the book, a substantial number of contributions also cover the French or Belgian legal environment of the given Charter provisions and the legal implications it may raise in that context (e.g. Galloux's chapter on Art. 13 on freedom of the arts and sciences, or Detroux on Art. 14 on the right to education). They also touch upon the relevant law and jurisprudence under the ECHR (e.g. Sudre's chapter on Art. 54 on the prohibition of abuse of rights). The integration of developments under the ECHR into the assessment of EU law may go as far as analysing and criticizing the ECJ's reliance on and subsequent use of the Strasbourg court's case law, as demonstrated, for example, by Willems' coverage of the judgment in *K.B.* v. *National Health Service Agency*.

The individual commentaries may also assess the question of whether the Charter's provisions add any value to how certain fundamental rights are protected at the level of EU primary and secondary law and in the case law of the ECJ. Their dilemma is whether the Charter provisions actually constitute more than an act of legal "symbolism". This was the case in Martucci's analysis of Article 42 on the right of access to documents, where he concluded that the recognition of that right in the Charter was a redundant act in terms of the normativity gained. Similar concerns could be raised, for example, in connection with Article 8 on the protection of personal data, Article 15 on freedom to choose a profession, Article 18 on the right of asylum, Article 21 on non-discrimination, Article 23 on sex equality, and Article 36 on the protection of consumers, where the explanations of the Charter admit that the right in question is guaranteed foremost as regulated in the Treaties and in EU legislation. This is quite a pressing legal issue, as the ECJ often decides the fundamental rights aspect of a legal dispute without identifying the fundamental right concerned, solely on the basis of the relevant Treaty or legislative provision. Similarly, in some instances, the fundamental rights issue is addressed as dictated by the long-standing, pre-Charter ECJ case law, for example as in the case of the right to education where that right was integrated into the free movement of persons and EU citizenship by the Court.

As another, similarly important doctrinal issue, the book makes a marked effort to clarify the question whether the Charter contains rights or principles or both. For example, Picod's commentary on Article 38 on the protection of consumers makes the assessment, as it follows from the legal text, that this "right" is in fact only a principle. Dumont raises the same question in connection with Article 34 on social security and social aid. His answer is that Article 34(2), which actually uses the term "right", might be regarded as regulating a right instead of a principle, while the rest of Article 34 must be seen as covering only principles. Misonne and de Sadeleer make a similar claim in connection to Article 37 on the protection of the environment. In their answer, they refer to the recent judgment in *Italia Nostra Onlus*, where the ECJ managed to make things perhaps even more ambiguous by linking the issue to Article 52(2) of the Charter and holding that some aspects of Article 37, as a principle, are based directly on Treaty provisions. On this basis, the first two sentences of Article 37 seem to constitute a "right", while the rest only principles. In the commentary by Peers et al., Article 37 was qualified unequivocally as a principle, "which articulates a principle of environmental protection, without any further legal content in the sense of a 'fundamental right'"(p. 995).

The commentary on the horizontal provision of Article 51 is Picod's work. As far as the entities bound to comply with the Charter are concerned, he invited the ECJ to extend its controls to the acts produced by the European Council despite the fact that the law on the Court's competences is not entirely clear. He noted that it is unfortunate that the General Court in the cases dealing with the EU-Turkey Statement failed to seize the opportunity to decide on the fundamental rights aspects of the claims put forward by the applicants. Picod's interpretation of the clause in paragraph 1, which states that the Charter applies to the Member States "only when they are implementing Union law", follows that provided in *Akerberg Fransson*. He added, however, that the Court's approach in defining the scope of application of the Charter in individual cases has been prudent and pragmatic, as demonstrated by a line of recent judgments, such as those in *Ida, Érsekcsanádi Mezőgazdasági* and *Vinko*. Concerning

the issue of the horizontal applicability of the Charter, Picod rightly points out that in *Association de mediation sociale* – contrary to what could rightly have been expected – the Court "a pu éviter de trancher la question".

Generally, this new commentary is a valuable contribution to the multilingual legal scholarship on EU fundamental rights law. With a few editorial tweaks, such as adding a conclusion/evaluation part to each chapter, or ensuring that every author stays within the remit of the book or cover the relevant EU law, it has the potential to become an equal counterpart of its English and German language competitors.

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